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No. 90-358

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director of
VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Third Circuit was correct in holding that the Virgin Islands gross receipts tax was not pre-empted by 49 U.S.C. 1513(a)?

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

33 V.I.C. Section 43(b)

The term "gross receipts" as used in this title shall mean all receipts, cash or accrued, of the taxpayer for services or derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or services, or both, including rentals, fees and other involvements, however designated, without any deduction on account of the cost of the property sold, the cost of materials used, labor cost, royalties, taxes, interest or discount paid, or any other expenses whatsoever.

STATEMENT OF THE CASE

Travel Services, Inc., (hereinafter Travel Services) is operating a travel agency business in the U.S. Virgin Islands. As a travel agency, its *services* include selling airline tickets on behalf of the airline industry. The fares collected by Travel Services for airline tickets are the property of the airlines. The moneys paid to Travel Services by the airlines, from those fares, are commissions for services rendered to the airlines, and are the property of Travel Services. These commissions are included in the gross receipts of Travel Services as payment for services rendered. Those moneys which go to the airlines for the sale of transportation are the airlines' gross receipts for the sale of air transportation, and are not taxed to Travel Services.

In filing its monthly gross receipts tax returns for the months of June 1983 through April 1986, Travel Service did not report as gross receipts the moneys paid to it by the airlines. It did not report the sums it received from the airlines in payment for providing to the airlines the service of selling airline tickets.

In examining Appellant's monthly gross receipts tax returns, the Government of the Virgin Islands (hereinafter Government) determined that Travel Services incorrectly excluded from its income all of the commissions received from the airline industry for services rendered. As a result of this examination, the Government added these commissions to the gross receipts of Travel Services. For the months in issue, Travel Services' received from the airlines a total of $1,655,026.16 as payment for selling the airline tickets.

The Government derives its authority to tax Travel Services' gross receipts (not the airline's gross receipts) from 33 V.I.C. Sections 43(a) and (b), which read as follows:

> "(a) Every individual and every firm, Corporation, and other association doing business in the Virgin Islands shall report *their* gross receipts and pay tax of four percent (4%) on the gross receipts of such business. . . .
>
> (b) The term "gross receipts", as used in this title shall mean *all receipts*, cash or accrued, *of the taxpayer* for *services or* derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or *services*, or both, including rentals, fees and other involvements, *however designated* . . ." (Emphasis supplied).

Travel Services brought an action in the Territorial Court of the Virgin Islands to enjoin the levying and collection of the gross receipts tax, asserting that 49 U.S.C. Section 1513(a) pre-empted the imposition of such a tax. This statute provides in pertinent part:

> "(a) No State (. . . including . . . the Virgin Islands . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

The trial court held that the local gross receipts tax was not prohibited by 49 U.S.C. Section 1513(a), and Travel Services appealed this determination to the District Court of the Virgin Islands, Appellate Division, which affirmed the decision of the trial court. Travel Services, thereafter appealed the decision of the District Court of the Virgin Islands, Appellate Division, to the United States Court of Appeals for the Third Circuit. The Court of Appeals for the Third Circuit affirmed the decision of the courts below. The Court of Appeals held that the Virgin Islands tax was a tax on the commissions earned by Travel Services not a tax on the sale of air transportation and, therefore, the Virgin Islands tax was not pre-empted by 49 U.S.C. Section 1513(a).

This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

The petition for writ of certiorari is not worthy of further review by this Honorable Court. Contrary to Travel Services' assertions, the decision below does not create an issue of national importance. Rather, the United States Court Appeals for the Third Circuit's interpretation of 49 U.S.C. Sec. 1513(a) is in keeping with prior judicial decisions. The requested expansion of the pre-emption provision found in Sec. 1513(a) goes beyond the intent of the statute, and is thus unwarranted.

The Third Circuit's decision does not conflict with any determinations reached by this Honorable Court or other courts of appeal. In fact, it is readily apparent that the Third Circuit scrupulously adhered to all of the applicable case law when it ruled that the Virgin Islands tax in question was not pre-empted by 49 U.S.C. Sec. 1513(a). This is evinced by a plain reading of the statute in question and associated judicial interpretations.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW RAISES NO ISSUE WORTHY OF REVIEW BY THIS COURT

Travel Services has failed to show that an issue of national importance arises from the decision below, nor has it adequately established that a conflict exists between the ruling issued by the United States Court of Appeals for the Third Circuit and those precedents set forth by this Honorable Court, or those of other courts of appeal. In fact, as will be developed below, the lower courts' determination of this matter raises no issue which necessitates this Honorable Court's intervention. Moreover, all the decisions of the lower court rendered in this case have carefully followed existing adjudications, both courts of appeal and U.S. Supreme Court. As such, the

petition currently before this Honorable Court is unworthy of further review on the merits.

A. The Decision Rendered Below Does Not Create an Issue of National Importance

It is undeniable, as advocated by Petitioner, that Congress, pursuant to the Airport Acceleration Act, moved to limit State taxation of airlines, and thus hold down the costs of air travel. It is this intent which Travel Services argues has been subverted by the decisions rendered below. However, the facts do not bear out this assertion. The parties to this matter stipulated to numerous facts before the Territorial Court of the Virgin Islands. See Petitioner's Appendix, 26a. In particular, paragraph number 10 specifies that "[t]he price of the airline ticket cannot be lowered or increased by Plaintiff *under any circumstances.*" *Id.* (emphasis added). As the price of airline tickets cannot be changed by Travel Services, a tax which is levied against a travel agent, which may raise *its* cost of doing business, cannot directly or indirectly raise air ticket prices. There has been absolutely no factual link established between a potential rise in travel agents' costs and a subsequent increase in airfares. Absent a showing that an increase in the cost of doing business as a travel agent raises the price of airline tickets, either directly or indirectly, Travel Services' case is not of national importance.

Petitioner relies upon its contention that the tax in question will inevitably result in higher airline ticket prices as grounds for its petition. This alleged result is the special and important reason proffered to this Honorable Court to justify its petition for the writ of certiorari. Clearly, the fact stipulated to by both parties to this matter contradicts the argument raised by Petitioner. The tax imposed on the commission earned by Travel Services has no greater impact on the cost of air transporta-

tion than an increase in the cost of any other item which goes into Travel Services' operating expenses.

Clearly, an extension of the pre-emption of taxes set forth in 49 U.S.C. 1513(a) was not envisioned by Congress to this extreme. While Travel Services argues that the Third Circuit's construction of 49 U.S.C. Sec. 1513(a) is narrow and without precedence, the truth is that its requested expansion of this section is beyond the bounds previously granted by courts. Otherwise, governments will be prevented from raising utility rates, rents, property taxes, or any other cost associated with engaging in the business of providing travel agent services within its jurisdiction.

The essential question in this matter is whether the taxation of the income received by a travel agent for providing a service to airlines is pre-empted by 49 U.S.C. Sec. 1513 (a). Petitioner has obfuscated the facts of this case by insisting that the Government has taxed the monies received from the sale of an airline ticket to the passenger. The reality is that the funds taxed, are those representing the commission paid by the airlines to the travel agent. Only the travel agent's gross income is being taxed.

It is readily apparent that Travel Services' petition does not actually raise an issue of national importance. While Counsel alleges that the tax levied by the Government of the Virgin Islands will increase the cost of air transportation, absolutely no proof of this allegation was provided to the court. The tax in question is assessed against the commission received by Travel Services, it is not charged against the sale of the airline ticket. As such, the decision of the United States Court of Appeals for the Third Circuit did not narrowly interpret 49 U.S.C. Sec. 1513(a).

B. The Decision Below Does Not Conflict with the Rulings of Other Courts of Appeal or This Honorable Court

This Honorable Court has stated:

> ". . . we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is pre-empted, and there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by law." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986); citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

This syllogism was religiously followed by the Third Circuit. It analyzed the taxable event in question and decided that it is *not* expressly pre-empted. See also *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). Furthermore, Travel Services failed to establish that Congress somehow intended to pre-empt this field of taxation. In fact, Petitioner never proffered evidence, to any court, that Congress considered the taxation of travel agent commissions, received from the airlines, to be pre-empted by 49 U.S.C. Sec. 1513(a). Therefore, absent the evidence required to issue a ruling otherwise, the Third Circuit refused to find that the Virgin Islands tax was pre-empted.

The Third Circuit's ruling carefully followed the existing body of law governing the statute in question. This is supported by reviewing this Honorable Court's holdings in *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7 (1983); *Wardair Canada, supra; Western Air Lines v. Board of Equalization of S.D.*, 480 U.S. 123 (1987). The *Aloha* Court struck down certain taxes

levied against airlines even though the tax purported to fall outside those pre-empted by Sec. 1513(a). Travel Services maintains that application of the *Aloha* decision disallows the implementation of the Virgin Islands tax, which is argued to be explicitly pre-empted by 49 U.S.C. Sec. 1513(a).

Aloha, however, is easily distinguished from the case at bar. In *Aloha* the tax in question was classified as a property tax. The level of taxation was then tied to the gross income of the airline. The *Aloha* Court pointed out that "Senator Cannon, one of the ADAA's sponsors, clearly stated in floor debate: 'The bill prohibits the levying of state or local head taxes, fees, gross receipts taxes . . . on the carriage of such passengers in interstate commerce.'" *Id.* at 13. With this in mind, the Court held that "[t]he manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines." *Id.* at 13, 14. See also *Western Air Lines v. Board of Equalization of S.D.*, 480 U.S. 123 (1987). Petitioner, Travel Services, thus argues that the purpose of the Virgin Islands gross receipts tax, 33 V.I.C. Sec. 43(a) & (b), as applied to its business activities, has the purpose and effect of taxing the gross receipts of the airlines to which it provides a service. This allegation is erroneous, unsubstantiated by fact, and not supported by existing case law.

The United States District Court of the Virgin Islands, Division of St. Croix, has characterized the Government's gross receipts tax in the following manner:

> ". . . . I find that the bulk of authority holds that, where there is no concomitant sales tax, a gross receipts tax is quite similar to a sales tax. (citations omitted). The similarity is, of course enhanced when, as in the Virgin Islands, the gross receipts tax is a general, across-the-board tax rather than a limited,

special one. *Johnson v. I.B.M. Corp.*, 10 V.I. 294, 298 (D.C.V.I. 1973).

The District Court's holding has provided us with the purpose and effect of the Virgin Islands gross receipts tax; namely, to tax the sale of goods and services. When this analysis is wedded to the fact that the tax was *only* applied to the commissions received by Travel Services, the obvious conclusion is that the purpose and effect of the taxation, is to tax the *sale* of the service provided by travel agents to airlines. This configuration is neither expressly, nor impliedly pre-empted by Sec. 1513(a), according to a clear reading of the statute and judicial interpretations of it. As was pointed out by the Territorial Court, when the exchange of service for commissions occurs between the airlines and travel agents, "[t]he airlines, by paying commissions, surely are not purchasing air transportation." *Travel Services, Inc. v. Government of the Virgin Islands*, Civil No. 204/87, slip op., (V.I. Terr. Ct., STX Div., June 23, 1988). Petitioner's appendix at 21a.

It is important to note at this stage that the Petitioner has incorrectly interpreted the meaning of the court in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990). It is true, as Travel Services states, that the court found the service provided by a travel agent to an airline creates an agency relationship. However, this was limited when the Court said "[t]ravel service operators are 'agents' *for purposes of antitrust law* when they sell tickets for air carrier's accounts." *Id.* at 753. (emphasis added). This holding prevents an application of this rationale to the case at bar. The *Illinois* analysis was specifically limited by the court to the marriage of antitrust law and agency relationships. There has been no extension of this decision to non-antitrust law cases. Clearly, the utilization of *Illinois Corporate Travel* for the illumination of Sec. 1513(a)'s intent is unfounded.

Thus, it is obvious that the United States Court of Appeals for the Third Circuit has carefully followed existing case law. This Honorable Court has provided clear guidance on what taxes are expressly pre-empted, as well as how to decide if other taxes are pre-empted by implication. The Third Circuit did not deviate from these directions at all. Rather, Travel Services is requesting that this Honorable Court change its existing analysis of 49 U.S.C. Sec. 1513(a) & (b), and strike down the Virgin Islands gross receipts tax as applied to travel agents' commissions. A result of this nature would unreasonably digress from the direction provided by Congress. As such, Travel Services' petition for writ of certiorari should be denied.

CONCLUSION

Travel Services' petition for writ of certiorari is unworthy of further review by this Honorable Court. The petition alleges that the holding promulgated by the United States Court of Appeals for the Third Circuit incorrectly interpreted the statute, and thus creates an issue of national importance. Rather, Travel Services' arguments, if adopted, would create an issue of national importance. The requested expansion of the pre-emption provision found in Sec. 1513(a) is unwarranted, as it goes beyond the intent of the statute.

Moreover, there is no merit to the argument that the Third Circuit deviated from existing judicial interpretations of the statute in question. A careful reading of the decision below, clearly establishes that the analysis employed exactly mirrors the reasoning of this Honorable Court, and other circuit courts of appeal. Again, Travel Services' argument, if adopted, would create, rather than obviate, the problems alleged to have been created by the Third Circuit's holding. Therefore, the Government of the Virgin Islands, for the reasons stated above, hereby

respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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